

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 10, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: WILLIAM J. BATTON,

Movant.

No. 16-8081
(D.C. Nos. 2:11-CV-00259-ABJ &
1:09-CR-00030-ABJ-1)
(D. Wyo.)

ORDER

Before **GORSUCH**, **BACHARACH**, and **MORITZ**, Circuit Judges.

William J. Batton seeks authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside or correct his sentence. For the following reasons, we deny authorization.

We may authorize the filing of a second or successive § 2255 motion if it is based on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255(h)(2); *see also id.* § 2244(b)(3)(C). Mr. Batton seeks to file a successive § 2255 motion to challenge his sentence based on the new rule of constitutional law announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

The *Johnson* decision voided in part the definition of a qualifying “violent felony” used for sentence enhancement under the Armed Career Criminal Act (ACCA). The problematic part of the definition is known as the “residual clause” and covers any crime that “involves conduct that presents a serious potential risk of physical injury to another,”

18 U.S.C. § 924(e)(2)(B)(ii). In *Johnson*, the Supreme Court held that “imposing an increased sentence under the residual clause of the [ACCA] violates the Constitution’s guarantee of due process.” 135 S. Ct. at 2563. And in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), the Court held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. We have also extended *Johnson*’s reach to defendants seeking authorization who received enhanced sentences under the career offender provision of the Sentencing Guidelines because the residual clause in that provision mirrors the one declared unconstitutional in *Johnson* and implicates similar constitutional concerns. See *In re Encinias*, 821 F.3d 1224, 1225-26 (10th Cir. 2016) (per curiam).

Mr. Batton was convicted after a jury trial of one count of interstate transportation of a minor with intent to engage in illegal sex acts with a minor, in violation of 18 U.S.C. § 2423(a). He was sentenced to 360 months’ imprisonment based on the specific offense characteristics identified in the presentence investigation report¹ and an enhancement under USSG § 4B1.5(a)(1)(B)(i)—Repeat and Dangerous Sex Offender Against Minors—for having a previous qualifying sex offense conviction.

Mr. Batton did not receive an increased sentence under the ACCA, the career offender provision of the guidelines or any other guidelines provision that contains

¹ He received a two-level increase for each of the following: the defendant was in the custody, care or supervisory control of the minor; the defendant was at least ten years older than the minor, and therefore used undue influence on the minor to engage in prohibited sexual conduct; the offense involved a “sexual act,” as defined in 18 U.S.C. § 2246.

similar language to that found in the career offender provision. Under these circumstances, Mr. Batton has failed to make a prima facie showing that he is entitled to authorization based on the new rule of constitutional law announced in *Johnson*.

Accordingly, we deny the motion for authorization. This denial of authorization “shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.” 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a long horizontal flourish.

ELISABETH A. SHUMAKER, Clerk